No. 00-1341

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KATURIA SMITH, ANGELA ROCK, AND MICHAEL PYLE,

Petitioners,

v.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, WALLACE D. LOH, ROLAND HJORTH, SANDRA MADRID, AND RICHARD KUMMERT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Michael E. Rosman
Counsel of Record
Hans F. Bader
Center For Individual Rights
1233 20th St., NW, Ste. 300
Washington, DC 20036
(202) 833-8400

Steven A. Hemmat
Law Office of Steven A. Hemmat, P.S.
119 First Ave., South, Ste. 500
Seattle, WA 98104
(206) 682-6644

Attorneys for Petitioners

Alfonse D'Amato
101 Park Ave., Ste. 2506
New York, NY 10178
(212) 883-5608

Attorney for Petitioner Katuria Smith

16PP

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

TABLE OF AUTHORITIES

Cases:

Adarand Constructors v. Pena, 515 U.S. 200 (1995) 1, 5

Alexander v. Sandoval, 2001 U.S. LEXIS 3367 (U.S. April 24, 2001) 1, 6

Buchwald v. University of N.M. School Of Medicine, 159 F.3d 487 (10th Cir. 1998) 2

Conn v. Gabbert, 526 U.S. 286 (1999) 6

Franklin v. Gwinnett, 503 U.S. 60 (1992) 7

Gratz v. Bollinger, 122 F. Supp. 2d 811 (2000) 8

Grutter v. Bollinger, 2001 U.S. Dist. LEXIS 3256 (E.D. Mich. Mar. 27, 2001) 2, 8

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993) 2

Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) 7

Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000), *petition for certiorari filed*, April 17, 2001 1

Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc., 499 U.S. 187 (1991) 7

Johnson v. Outboard Marine Corp., 172 F.3d 531 (8th Cir. 1999) 8

Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) 7

Parents Involved In Community Schools v. Seattle School District No. 1, 2001 WL 360610 (W.D. Wash. April 6, 2001) 3

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 1, 2, 6, 7

Smith v. University of Washington Law School, 2 F. Supp. 2d 1324 (W.D. Wash. 1998) 6

Talbert v. Richmond, 648 F.2d 925 (4th Cir. 1981) . . . 2

Texas v. Hopwood, 518 U.S. 1033 (1996) 3

Texas v. Lesage, 528 U.S. 18 (1999) 5, 8

United States v. Allen-Brown, 2001 U.S. App. LEXIS 3566 (11th Cir. March 9, 2001) 9

United States v. Brown University, 5 F.3d 658 (3d Cir. 1993) 2

United States v. Fordice, 505 U.S. 717 (1992) 6

Wilson v. Layne, 526 U.S. 603 (1999) 5, 6

Wooden v. Bd. Of Regents Of The University System Of Georgia, 2001 U.S. App. LEXIS 7159 (11th Cir. April 19, 2001) 9

Constitutional Provisions, Statutes:

28 U.S.C. § 1292(b) 4, 9

42 U.S.C. §§ 2000d, *et seq.* 1, 5-7

U.S. Const. amend. I 10

U.S. Const. amend. XIV § 1 . . . . . 1, 6, 7, 10

INTRODUCTION[1]

Just last month, in *Alexander v. Sandoval*, 2001 U.S. LEXIS 3367 (U.S. April 24, 2001), four members of this Court noted that the five Justices who voted to reverse the California Supreme Court's injunction in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

> divided over the application of the Equal Protection Clause -- and by extension Title VI -- to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for *any* particular substantive interpretation of Title VI.

Alexander, 2001 U.S. LEXIS 3367 at *57 n.15 (Stevens, J., dissenting) (emphasis added). True for Title VI, it is just as true for that statute's coextensive progenitor, the Equal Protection Clause. *See also Adarand Constructors v. Pena*, 515 U.S. 200, 218 (1995) ("*Bakke* did not produce an opinion for the Court"); *Hopwood v. Texas*, 236 F.3d 256, 275 (5th Cir. 2000) (Weiner and Stewart, JJ.) ("Although *Bakke* clearly stands for the proposition that the government can use racial preferences under some circumstances, no controlling rationale emerged from that opinion to delineate precisely what those justifying circumstances are"), *petition for certiorari filed*, April 17, 2001.

Respondents (hereinafter, the "Law School") concede that the issue presented in this case is one of national importance (Opp. Br. 1), and they concede that there is a circuit split on this issue (Opp. Br. 13). They claim, however, that it is not a "significant conflict" (*id.*) -- leav-

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[1] The Ninth Circuit issued its mandate on March 1, 2001. The clerk's office of that court apprises us that this means that that court rejected *en banc* review. *See* Pet. 1 n.1.

ing us with perhaps the first ever *in*significant conflict between two federal courts of appeals on an issue of great national importance -- because the Fifth Circuit is so isolated and unreasonable that no good faith basis for a disagreement exists over *Bakke*'s proper interpretation. Opp. Br. 13-14. They proceed to cite a series of cases in footnotes to demonstrate this point (*id.* at 13 nn. 11, 12). Suffice it to note that the Law School's circuit court cases either have nothing at all do with race discrimination (*Buchwald v. University of N.M. School Of Medicine*, 159 F.3d 487 (10th Cir. 1998), *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993)) or were decided long ago and called into question by later authority that it fails to cite (*e.g.*, *Talbert v. Richmond*, 648 F.2d 925 (4th Cir. 1981), which was limited by *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213 n.5 (4th Cir. 1993)).[2]

That the Law School feels compelled to rely upon the fundamental clarity of the 1-4-4 split in *Bakke* speaks volumes. The other arguments it offers are meritless.

ARGUMENT

The Law School contends that, no matter how important the issue of diversity-as-compelling-interest is generally, it is not important in this case. It is wrong.

1. The Law School correctly asserts that the

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[2] The Law School, as well as *amicus* Pacific Legal Foundation, correctly note that the district court in *Grutter v. Bollinger*, 2001 U.S. Dist. LEXIS 3256 (E.D. Mich. Mar. 27, 2001) agreed with the Fifth Circuit's conclusions and held that diversity is not a compelling governmental interest. Opp. Br. 2 n.3.

courts below dismissed petitioners' claims for general prospective relief after the passage of I-200. *See* Pet. 9-10.[3] But the claims for damages with respect to the Law School's past system remain, and the diversity-as-compelling-interest question is a very important question in determining whether plaintiffs will be entitled to damages. Thus, this case is much different from *Texas v. Hopwood*, 518 U.S. 1033 (1996), even if the denial of the petition there, or the reasons given by two of the nine Justices of this Court for that denial, had precedential weight (which, of course, they do not). In *Hopwood*, defendants *never appealed* the district court's finding that the system employed in the year that the plaintiffs there applied violated the Constitution. Petition For A Writ Of Certiorari, *Texas v. Hopwood*, No. 95-1773, 3 ("The State did not appeal the district court's ruling with respect to the 1992 policy"); Reply Brief, *Texas v. Hopwood*, No. 95-1773, 2 n.1 (1992 admissions system was "two-track process that petitioners have abandoned and that is not being defended in this Court"). In contrast, the Law School here has defended vigorously (and continues to defend vigorously) the policy under which petitioners applied. There is a real, live controversy over an admissions system actually employed by the Law School.

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[3] The lower courts dismissed petitioners' claims for prospective injunctive relief prior to any judicial interpretation of I-200's purported proscription on race-conscious decision-making. *Compare Parents Involved In Community Schools v. Seattle School District No. 1*, 2001 WL 360610, *1 (W.D. Wash. April 6, 2001) (I-200 did not preclude Seattle high school transfer policy from giving preferences to students whose race "will help mitigate the imbalance of the racial makeup" of any school whose racial balance deviates by more than 15% from overall racial breakdown of the students attending Seattle's public schools).

2. Most troubling for the Law School's argument is the fact that both courts below found the diversity issue a "controlling question" for purposes of 28 U.S.C. § 1292(b). Indeed, the Law School now claims that it did not "stipulate[] that [the issue of whether diversity is a compelling governmental interest] is a controlling question of law for purposes of 28 U.S.C. § 1292(b)." Opp. Br. 9 n.8, citing Pet. at 11. Rather, it asserts that it only stipulated that the District Court should sign an order pursuant to Section 1292(b) *stating* that that issue is a controlling question of law. It is hard to know what to make of this distinction other than to wonder whether the Law School intentionally asked the District Court to sign an order containing a representation that it believed to be false. In any event, the Law School does not dispute that both courts below concluded that the issue presented here was a controlling question.

To further distance itself from its previous stipulation, the Law School suggests that the situation changed when, subsequent to entry of the stipulated order holding the issue to be a "controlling question," it admitted Michael Pyle because that mooted his previously "live claim for prospective relief." Opp. Br. 9 n.8. What the Law School omits is that Pyle had applied early in 1999, prior to the time when it entered into the stipulation; thus, it better than anyone else knew the likelihood of his "live claim for prospective relief" dying.

3. The Law School then asserts that the diversity-as-compelling-interest question is "hypothetical and premature" (Opp. Br. 10) at least in part because "resolving the question will not impact the Court of Appeals remand of petitioners' individual damages claims to the district court" (*id.*). It makes various arguments to sup-

port this contention: first, that the question is irrelevant to the claims against the individual defendants because of their qualified immunity defense (Opp. Br. 10-11); second, that the question is irrelevant to the claim against the Law School under Title VI because *it* has a "qualified immunity defense to Title VI damages liability" (Opp. Br. 10); third, that it may be able to establish that petitioners lack standing under *Texas v. Lesage*, 528 U.S. 18 (1999) (Opp. Br. 11, 12-13); and, fourth, that the trial court has not yet held a trial on whether the Law School's system was "narrowly tailored" to meet the interest of diversity, and that a ruling on whether diversity is a compelling governmental interest is therefore "premature" (Opp. Br. 11).

At best these arguments only show that there are other issues in this case. But that should hardly prevent this Court from granting the petition. This Court has no rule that every question it decides must dispositively determine the entire case, and the cases in which this Court will remand for further proceedings consistent with the opinion are too numerous to cite. *E.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) (holding that Congressionally-authorized programs implementing race preferences are subject to strict scrutiny, and remanding for further proceedings).

In any event, the Law School's arguments are red herrings. First, the Law School's qualified immunity argument ignores the basic requirements of any qualified immunity analysis. Prior to determining whether a right had been clearly established, this Court first determines whether a violation of a right has been alleged at all. *Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an

actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation'" *quoting Conn v. Gabbert*, 526 U.S. 286, 290 (1999)). "Deciding the constitutional question before addressing the qualified immunity question . . . promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Id.* Thus, even if a court were to determine that the individual defendants are entitled to qualified immunity, it would *first* have had to determine whether there had been any constitutional violation at all.

The Law School's claim that entities sued under Title VI have some sort of "qualified immunity defense to Title VI damages liability" (Opp. Br. 10) is wrong.[4] The

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[4] The Law School's suggestion that the District Court decided this issue in its favor (Opp. Br. 5, 9, 12 n.8) can best be described as wishful thinking. In fact, the District Court's decision on the Law School's initial motion to dismiss suggested that the Law School would be liable under Title VI if it "intentionally discriminated against certain students based on race," *Smith v. University of Washington Law School*, 2 F. Supp. 2d 1324, 1337 (W.D. Wash. 1998), a proposition far more consistent with the cases that have explicitly rejected the Law School's argument than with any notion of "qualified immunity" under Title VI. *See* n.5, and accompanying text, *infra*. In truth, neither court below directly addressed the Law School's argument.

The Law School's contention that this "Title-VI-qualified-immunity" question is the issue petitioners intended to raise by the second question presented in the petition is worse than just wrong. It is disingenuous. The answer to the second question, at least with respect to Title VI, will be determined by the answer to the first question if the Court adheres to its previously-stated rule that Title VI extends no further than the Equal Protection Clause. *Alexander v. Sandoval*, 2001 U.S. LEXIS 3367, *11; *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992). *But see Bakke*, 438 U.S. at 418 (1978)

(continued...)

argument is apparently based upon this Court's rulings that a funding recipient must have reasonable notice of a violation before a claim of damages can be asserted against it. Opp. Br. 12. But in *Franklin v. Gwinnett*, 503 U.S. 60, 74-75 (1992), this Court held that no "notice problem . . . arise[s] in a case . . . in which intentional discrimination is alleged." Plaintiffs here allege intentional discrimination (the only kind of discrimination that violates the Equal Protection Clause and Title VI).[5] Not surprisingly, then, every court that has considered this argument has rejected

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[4](...continued)
(Stevens, J., concurring in the judgment in part and dissenting in part) ("neither [the] language [of Title VI] nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage"). The separate second question does nothing more than preserve the argument that it should not (an argument that obviously could not successfully be presented to the lower courts in this case since it is inconsistent with this Court's precedents).

[5] A finding of intentional discrimination, or disparate treatment, is not dependent upon the clarity of the law. If it were, *Bakke* would have been wrongly decided because, however unclear the Law School thinks the law is now, it was far more unclear then. This Court nonetheless concluded that the Davis Medical School engaged in intentional discrimination in violation of Title VI. *See also, e.g., Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (policy of excluding women capable of becoming pregnant from jobs involving exposure to lead violated Title VII despite "the absence of a malevolent motive"; "Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates . . . "); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999) (The Civil Rights Act of 1991 "limits compensatory and punitive damages awards, however, to cases of 'intentional discrimination' -- that is, cases that do not rely on the 'disparate impact' theory of discrimination").

it. *E.g.*, *Hopwood v. Texas*, 78 F.3d 932, 957, 959 (5th Cir. 1996) (the University of Texas Law School engaged in intentional discrimination and was liable under Title VI for compensatory damages for its race-conscious affirmative action program even though "the law school had always acted in good faith" and "[t]his is a difficult area of the law, in which the law school erred with the best of intentions"); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 835-36 (2000) (in claim against Board of Regents under Title VI, "to the extent that the Board seeks to extend the doctrine of qualified immunity to cover its actions, the Board's arguments must be rejected, as 'qualified immunity is not a defense available to governmental entities, but only to government employees sued in their individual capacity'" *quoting Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999)); *Grutter v. Bollinger*, 2001 U.S. Dist LEXIS 3256, *98 (March 27, 2001).

The Law School further asserts that deciding the diversity issue is "premature" because the District Court has not yet held a trial on narrow tailoring. Opp. Br. 11. This argument misses the point. If petitioners are correct, and "diversity" is not a compelling governmental interest, then a "narrow tailoring" trial in the District Court would be gratuitous. (Thus, the Law School is being captious in disputing petitioners' contention that a "liability" trial will be unnecessary if this Court reverses the Ninth Circuit (Opp. Br. 11); plainly, such a reversal would avoid a "narrow tailoring" trial. The Law School simply disputes whether that is a "liability" trial.)

Finally, relying on *Texas v. Lesage*, 528 U.S. 18 (1999), the Law School argues that plaintiffs may not have "standing" to seek damages. This is wrong because *Lesage* had nothing to do with standing, but simply identi-

fied an affirmative defense (on which the Law School will bear the burden) to one kind of damages, those resulting from the Law School's rejection of petitioners' applications. *Wooden v. Bd. Of Regents Of The University System Of Georgia*, 2001 U.S. App. LEXIS 7159, *47-*51 (11th Cir. April 19, 2001); *id.* at *41 (*Lesage* "does not refer to standing at all"). In any event, the Law School has once again only shown that there are other issues in the case, a point petitioners have never disputed. We assert only that the diversity issue is a very important one in this case (and generally), one that qualified as a "controlling question of law" under Section 1292(b).

4. Perhaps most peculiar is the Law School's argument that this Court should deny the petition because the record evidence on the value of diversity is incomplete, petitioners having done "nothing to contest the important of diversity to education -- particularly to legal education." Opp. Br. 16.[6] That is, and no doubt out of heartfelt concern for petitioners, the Law School argues that its evidence is so overwhelming that it just would be unfair to take the case in its current posture.

Of course, the Law School also concedes that "whether a particular asserted interest is compelling is a

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[6] It is particularly important to legal education, the Law School argues, because race is "a critical factor in the operation of the legal system (such as in jury selection and sentencing)." Opp. Br. 16 n.15. How very odd, then, that the different perspectives on the criminal justice system that race allegedly provides do not justify considering race in the selection of jurors. *See, e.g., United States v. Allen-Brown*, 2001 U.S. App. LEXIS 3566 (11th Cir. March 9, 2001) (defense attorney's effort to obtain more diversity on predominantly-white jury by using peremptory challenges was not in pursuit of a sufficiently compelling reason and hence unconstitutional).

question of law." Opp. Br. 20. The parties, it asserts, dispute only whether "an institution seeking to use race to foster diversity must shoulder a particular evidentiary burden" (*id.*). But the question being one of law, and not fact, *should* mean that the Law School's evidence, subjective as it may be, is irrelevant and that there is *no* particular evidentiary burden the Law School must (or can) meet because diversity either is or is not compelling. The self-contradictions here -- or, at the very least, some rather confusing statements about the relationship between questions of law and questions of fact -- only underscore the need for this Court's guidance. *See also* Defendants-Appellees' Ninth Circuit Opposition Brief, 55 (the benefits of "diversity" are "questions of constitutional fact, which are not open to relitigation in every case").

Curiously, the Law School never disputes the fact that Justice Powell had no evidence about the value of diversity and never thought he needed any because an institution's "academic freedom" was sufficient to support its belief in that value. Pet. 23. But in response to petitioners' point that Justice Powell seemed to grant an interest in "academic freedom" only to "widely held" ideas, Pet. 22-23, the Law School seems to endorse this idiosyncratic interpretation of the First Amendment. Opp. Br. 19 n.18 (suggesting that "inclusionary rationales" entitled to more First Amendment protection than "exclusionary rationales" because of the Equal Protection Clause). Aside from misinterpreting the Fourteenth Amendment as well as the First -- the Equal Protection Clause endorses neither inclusion nor exclusion, to the extent they imply results, but rather equal *treatment*, a process -- the Law School's argument only further demonstrates how this area of law has distorted traditional doctrine. Help is needed.

Respectfully submitted,

Michael E. Rosman
Counsel of Record
Hans F. Bader
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., NW
Suite 300
Washington, DC 20036
(202) 833-8400

Steven A. Hemmat
Law Office of Steven A. Hemmat, P.S.
119 First Ave. South
Suite 500
Seattle, WA 98104
(206) 682-6644

Attorneys for Petitioners

Alfonse D'Amato
101 Park Ave., Suite 2506
New York, NY 10178
(212) 883-5608

Attorney for Petitioner Katuria Smith